IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1217

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

Cross-Petitioners,

v.

HENRY A. KISSINGER,

Respondent.

RESPONDENT HENRY A. KISSINGER'S BRIEF IN OPPOSITION

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Respondent Henry A. Kissinger respectfully suggests that the cross-petition filed herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia be denied.

COUNTERSTATEMENT OF THE CASE

The basic facts relating to this litigation are set forth in the Petition for a Writ of Certiorari filed in No. 78-1088, which seeks review of the portion of the judgment below

that is adverse to Dr. Kissinger. We repeat here only those facts necessary to an understanding of the cross-petition.[1]

When Dr. Kissinger was Assistant to the President for National Security Affairs, a secretary generally listened to and took notes of his telephone conversations. This was done to ease the administrative burdens of the office. For example, Dr. Kissinger's Executive Secretary checked the notes periodically to make up his appointment calendar; his Senior Special Assistant also read them in order to know whether any matters discussed by telephone required follow-up or implementation. Pet. App. 74a.

These follow-up actions included the preparation of letters and memoranda which were circulated in the ordinary course of business and filed as permanent records of the office. The notes, however, were never circulated to other persons in the government or seen by anyone other than Dr. Kissinger's immediate aides. They were rough and unedited; they were used as work aids, not records, and as such were always kept in Dr. Kissinger's office along with other private papers in files marked "personal." Pet. App. 74a-75a.

When Dr. Kissinger became Secretary of State, his personal files, including the White House telephone notes, were physically removed to his office in the State Department. The notes were stored there in separate personal files until October 29, 1976, when, in preparation for Dr. Kissinger's retirement from office, they were placed for safe keeping in a bank-type vault at the estate of then Vice President Rockefeller. Pet. App. 76a-77a. On December 28, 1976, Dr. Kissinger donated the White House notes, and similar notes made when he was Secretary of State, to the

[1] Most of the facts appear in Dr. Kissinger's uncontroverted affidavit, which is contained in the Appendix to the Petition for a Writ of Certiorari filed in No. 78-1088 ("Pet. App."). Other references are to the Joint Appendix ("JA") filed in the Court of Appeals.

United States pursuant to a deed of gift agreement signed by him and the Librarian of Congress. Pet. App. 77a-78a; JA 77.

After Dr. Kissinger made the donation, cross-petitioners filed a Freedom of Information Act ("FOIA") request with the Department of State demanding access to

> [a]ll transcribed secretarial notes of the telephone conversations held by Henry Kissinger during his government service as Assistant to the President for National Security Affairs, commencing on or about January 20, 1969, and during his service as Secretary of State, extending through the present time. JA 71.

The Department denied the request on the ground that none of the documents in question were State Department agency records. JA 75.

Following this denial, cross-petitioners sued the incumbent Secretary of State, Cyrus R. Vance, the Librarian of Congress, Daniel J. Boorstin, and Dr. Kissinger. Their complaint, which purported to be based on FOIA, alleged that the notes of Dr. Kissinger's conversations, both as a Presidential Assistant and as Secretary of State, "have always been the property of the Department of State," JA 33, 43, 46; it requested a declaration that "legal and equitable title to the secretarial notes has always been in the Department of State," JA 53; and it asked for an order directing the State Department to repossess and thereafter disclose to them the non-exempt portions of the notes. *Id.*

On cross-motions for summary judgment, the District Court held that the notes made of Dr. Kissinger's telephone conversations while he was Secretary of State were State Department "agency records" which must be returned to the Department for processing and eventual release under

FOIA. It declined, however, to reach the same conclusion with respect to the notes made when Dr. Kissinger was a Presidential Assistant, and rendered summary judgment in his favor on this issue. Pet. App. 59a-60a. The Court of Appeals affirmed the District Court's decision on both points. Pet. App. 47a-48a.

In the Memorandum accompanying its *per curiam* judgment, the Court of Appeals stated that the District Court had properly rejected cross-petitioners' claim to the White House period notes because

> (1) The Freedom of Information Act does not extend to those of the President's advisers who are so close to him as to be within the White House rather than the Executive Office of the President [citations omitted]. (2) The mere relocation of these documents to the State Department without any indication that they were used by that agency does not render them State Department records obtainable via an FOIA request to that department. (3) The speculation that some of these earlier transcripts concerned the affairs of the National Security Council adds nothing to plaintiffs' claim because no FOIA request was made of the Security Council, and, as mentioned above, the transfer of the notes to the State Department does not change their character. Pet. App. 49a-50a.

REASONS FOR DENYING THE WRIT

The portion of the decision below which relates to the notes made when Dr. Kissinger was Secretary of State raises substantial questions concerning the scope of FOIA, the relationship between that Act and the recordkeeping practices of agencies under the Federal Records Act, and

the constitutional privacy rights of past and present federal officials. *See* the Petition for a Writ of Certiorari filed in No. 78-1088. These same questions would, of course, be presented here if the courts below had concluded that the White House period notes were subject to cross-petitioners' FOIA claims. However, the conclusion actually reached — that cross-petitioners had no FOIA access rights to notes made of Dr. Kissinger's telephone conversations when he was a Presidential Assistant — raises no substantial legal issue meriting review by this Court. Indeed, the only issues cross-petitioners present relate to factual questions resolved against them both in the District Court and in the Court of Appeals. There is no reason why this Court should exercise its certiorari jurisdiction to permit reexamination of the findings made below.

I.

Cross-petitioners do not dispute the Court of Appeals' conclusion that

> [t]he Freedom of Information Act does not extend to those of the President's advisers who are so close to him as to be within the White House rather than the Executive Office of the President. Pet. App. 49a.

Nor could they do so, because it is plain that FOIA does not apply to the papers of Presidential Assistants.[2] Faced with this insurmountable obstacle, cross-petitioners instead argue that

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[2] FOIA applies only to "agency records." The Office of the President, to which Dr. Kissinger was assigned, is not an "agency." 5 U.S.C. §552(e); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); Conf. Rep. No. 93-502, 94th Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6267, 6293. This basic statutory principle is so clear that counsel for the other respondents in No. 78-1088 advised the District Court his clients had for this reason made no FOIA claim for the White House notes. Tr. 57-58 (September 28, 1977).

> documents which originated in the White House but were later circulated to other agencies in the routine course of government business without any effort by the President to exercise continuing control or maintain their confidentiality . . . should be treated like the records of any other federal agency to which FOIA applies. Cross-Petition at 8.

It is unnecessary for this Court to consider whether cross-petitioners' theory is legally sound, because there is no basis for applying it in the circumstances of this case. The notes of Dr. Kissinger's White House conversations were not "circulated" to the State Department "in the routine course of government business," *Id.*; the Department was not "free to use the notes as it saw fit," *Id.* at 9; it never obtained "custody" of the notes, *Id.* at 10; and it never had "control over their use and disposition." *Id.* at 8.

The record shows that the notes were treated as personal papers and kept in separate personal files when Dr. Kissinger was at the White House; when he moved to the State Department, these same files were relocated to his new office and "continued to be maintained in separate personal files during my years at the Department." Pet. App. 76a. The record further shows that the notes were never circulated outside Dr. Kissinger's office, and that only he and his immediate aides had access to them. Pet. App. 74a-75a. The State Department did not "possess" or "control" these files any more than it would have possessed or controlled them had they been lodged in Dr. Kissinger's basement.[3]

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[3] Cross-petitioners suggest that the failure of the White House to assert continuing control over the notes shows it "surrendered" them to the State Department. Cross-Petition at 7-8, 9. We think the White House's lack of interest in the notes simply confirms Dr. Kissinger's testimony that these papers were "work aids which I could retain or discard as I chose." Pet. App. 74a. Moreover, as the opinion of the State

The only connection between the White House notes and the State Department was the fact that they were once physically stored there in Dr. Kissinger's personal files.[4] The Court of Appeals correctly concluded that

> [t]he mere relocation of these documents to the State Department *without any indication that they were used by that agency* does not render them State Department records obtainable via an FOIA request to that department. Pet. App. 50a (emphasis supplied).

There is no reason why this Court should intervene to reconsider the factual accuracy of that finding.

II.

Cross-petitioners also argue that some of the White House period notes might be records of the National Security Council, and that "the portions of the notes relating to Mr. Kissinger's NSC duties fell within the [State] Department's disclosure responsibilities under the FOIA. . . ." Cross-Petition at 13-14. There is no evidence whatever that

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Department's Legal Adviser makes clear, the Department did not itself attempt to exercise any control over the notes because it believed they were personal papers which it neither owned nor had the right to possess. Pet. App. 66a, 69a.

[4] Cross-petitioners assert it is "logical to conclude" that the White House notes were used for a "variety of job-related purposes" after they were relocated to the State Department. Cross-Petition at 9. There is no evidence whatever to support this assertion. Since the sole use made of the notes was to keep Dr. Kissinger's appointment calendar current and to permit his Senior Special Assistant to keep abreast of his daily activities, Pet. App. 74a, the only "logical" inference is that the White House notes were not used for any purpose while they were stored at the State Department.

any of the notes are NSC records.[5] But even if it were assumed that this is the case, cross-petitioners' argument must fail.

First, the argument presupposes that the State Department was the "last agency with physical custody" of the notes. *Id.* at 3. This is not true. The State Department, as such, had no access to, or custody or control over, any of the documents stored in Dr. Kissinger's personal files. If the White House notes contained NSC records, the last agency having custody was the NSC, not the State Department. Since the "mere relocation" of the notes did not "change their character," Pet. App. 50a, and cross-petitioners made no FOIA request to the NSC, the Court of Appeals correctly held that "[t]he speculation that some of these earlier transcripts concerned the affairs" of a non-party agency "adds nothing" to cross-petitioners' claim. *Id.*

Second, the NSC theory is inconsistent with the case cross-petitioners submitted for judgment in the District Court. Cross-petitioners' complaint did not allege that the White House notes were NSC records; it alleged that these notes reflected conversations "held by defendant Kissinger during his service as Assistant to the President for National Security Affairs." JA 33, 42. Although Dr. Kissinger pointed out at the very beginning of the litigation that the papers of Presidential Assistants could not be subject to

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[5] Cross-petitioners speculate that some of the White House notes "necessarily relate to the affairs of the NSC" because of Dr. Kissinger's connection with the Council. Cross-Petition at 11. As Assistant to the President for National Security Affairs, Dr. Kissinger doubtless discussed the "affairs" of many agencies, but this does not mean the notes of such conversations can be characterized as the "records" of the agencies discussed. The Governmental Organizational Manuals to which cross-petitioners refer always list Dr. Kissinger's position with the NSC as "Assistant to the President." There is no basis whatever for inferring that the notes at issue here reflect conversations made in any other capacity.

FOIA, cross-petitioners never moved to amend their pleadings to allege that any of the White House notes were NSC records and never introduced any evidence to show that they were.

The theory of cross-petitioners' summary judgment motion was that the White House notes were State Department records; the NSC alternative did not surface until *after* the District Court issued its opinion denying cross-petitioners' claim. Cross-petitioners' post-decision efforts to change the theory of their motion were properly disregarded by the District Court, and just as properly rejected by the Court of Appeals. There is no reason why this Court should grant review to entertain an argument that was not properly presented below, and which in any event was correctly characterized by the Court of Appeals as "speculation." Pet. App. 50a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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